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July 25, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 17, 2007

Case Number: TSO-0487

This Decision concerns the eligibility of xxxxxxxx (hereinafter "the individual") for an access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's access authorization should be granted. For the reasons detailed below, it is my decision that the individual's access authorization should not be granted.

I. BACKGROUND

The individual has been employed at the DOE site since October 2004. On February 9, 2007, the DOE issued a notification letter to the individual. Attached to the notification letter was a statement entitled "Information creating a substantial doubt regarding eligibility for an Access Authorization" (hereinafter referred to as the "information statement"). The first security concern in the information statement relates to an October 9, 2006 evaluation of the individual by a DOE consulting psychiatrist. In her October 23, 2006 report she diagnosed the individual with Depressive Disorder Not Otherwise Specified and Personality Disorder Not Otherwise Specified. The information statement indicates that the DOE consulting psychiatrist's diagnosis raises a security concern under Criterion H. 10 C.F.R. §710.8(h).

The second security concern specified in the information statement relates to the following events: i) in March 2004, the individual was terminated from a job that he held for 10 years for violence in the workplace, ii) on the individual's October 2004 Questionnaire for National Security Position (QNSP) he failed to disclose his March 2004 hospitalization for a mental evaluation, iii) in May 2006, the individual was placed on a performance improvement plan (hereinafter "May PIP") for a workplace outburst, and iv) during 2005, the individual failed to notify the DOE of the mental health treatment he was receiving. The notification letter indicates that those actions indicate the individual is not honest reliable and trustworthy and therefore those behaviors raise a security concern under Criteria L. 10 C.F.R. §710.8(l).

The notification letter informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the notification letter. The individual requested a hearing.

I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (the hearing).

The individual believes the medication that he is taking for depression and the coping skills he has learned from his psychologist have significantly changed his ability to interact with others and that these changes have mitigated the DOE security concerns. Tr. at 162. Below is a summary of the testimony at the hearing.

II. HEARING TESTIMONY

A. The Individual's Psychiatrist

The individual's psychiatrist testified that she saw the individual six times between August 2006 and May 2007. Tr. at 11 and 13. She testified that the individual "presented with some feelings of depressed mood, anxiety, trouble sleeping and little bit of frustration [with] what was going on with [his] work situation." Tr. at 12. She diagnosed the individual with depressive disorder, not otherwise specified. Tr. at 11. She testified that her initial treatment plan was medication (Wellbutrin twice a day) for the depression symptoms, and she advised the individual to seek professional treatment to improve his interpersonal skills. Tr. at 13.

She testified that the individual's depressive symptoms have been resolved, and he has significantly improved his interpersonal and coping skills. Tr. at 13. She believes the individual has committed to improving his mental health and has been compliant in taking the medication which she prescribed and in seeking the professional counseling which she recommended. She testified that she believes the individual is honest and has displayed good judgment in the last year. She believes the individual's prognosis is good. Tr. at 14.

B. The Individual's Psychologist

The individual's psychologist testified that the individual first visited her in July 2006. At that time, she diagnosed the individual with mild depressive disorder. Tr. at 52. She testified that she has had 17 sessions with the individual. Tr. at 58. She described the treatment in the following way:

The treatment focus consisted mainly of improving [the individual's] problem-solving skills and coping skills, since a great deal of his issues were situational and surrounding some of the difficulties that he was having with his employment. So what we started to do was to develop his support system, and he was encouraged to continue to build up that support system and utilize the people in his life to be able to assist him in doing some things.

Also, one of the other goals that we worked on was improving his self-esteem, improving some of the other symptoms that we saw in regards to eating and sleeping patterns.

Tr. at 56.

It was also important in our course of treatment that he work on his social development by improving his social interactions and decreasing some of the sensitivity that he might have had, and again, improving on his self-esteem and developing and using more effective communications skills.

Tr. at 57.

She believes the individual should continue to see her monthly for a few months and then evolve into a pattern of quarterly counseling. Tr. at 64 and 79. She testified that she has observed a significant change in the individual over the treatment period.

His affect has completely changed, he's a lot more confident . . . his view of the future is a lot more open. His view of himself, which is what's most important, is very optimistic. He's very confident in his abilities and knows that he can do lots of different things. His relationships with people, from what he has reported to me, have changed, especially with his family He's also reported at work that those relationships have changed. So I've seen a great deal of progress with [the individual].

Tr. at 72.

She indicated that the individual always follows through on his commitments to her and that she believes that during the time she has known the individual he has demonstrated good judgment and reliability. Tr. at 61. Because of the individual's investment in the process she believes he will inform her if he has future symptoms of depression. Tr. at 77.

C. The Individual's Friends

The individual's first friend testified that he has known the individual for a little over one year. Tr. at 36. He sees the individual almost every weekend at motorcycle riding events. Tr. at 36. He has never seen any indication that the individual was depressed. Tr. at 38. He testified the individual "gets along with everybody" and he is a cheerful happy person. Tr. at 38.

The individual's second friend testified that she also knows the individual from the motorcycling group's events. Tr. at 44. For the year and a half that she has known the individual, she has never seen any signs of mood swings or depression. She believes the individual is reliable. Tr. at 46.

D. The Individual's Co-Workers

The individual's first co-worker testified that in April 2006 they had a verbal argument. Tr. at 83. Following that argument she explained the situation to their mutual supervisor. As a result of that argument the supervisor placed the individual on the May PIP. Tr. at 85. She testified that since that argument she has never had any other problems working with the individual. Tr. at 86. She testified that the individual completed the PIP on May 1, 2007. Tr. at 85. She testified that she believes the individual's counseling has improved his ability to deal with problems and interact with co-workers. Tr. at 88.

A second co-worker testified he has known the individual as a co-worker for two years. Tr. at 149. He has worked closely with the individual on a number of assignments. He believes the individual has always been dependable. Tr. at 149.

E. The Individual's Supervisors

The first supervisor testified that he has known the individual for three years. He was the individual's supervisor for several months starting in February 2006. Tr. at 111. He wrote and presented the May 2006 PIP to the individual. The PIP was designed to improve the individual's work place behavior by helping him improve his interpersonal skills and manage his workplace frustrations. The PIP required the individual to receive counseling from the Employee Assistance Program (EAP) and it required him to talk with his supervisor about work place frustrations on a regular basis. Tr. at 111 and 118. The first supervisor testified that the individual completed all of the requirements of the PIP and voluntarily obtained counseling that exceeded the requirements of the PIP. Tr. at 113. He testified that since the individual received the PIP there have not been any further workplace outbursts and "everybody has been very, very happy with [his] work." Tr. at 115.

The second supervisor testified that he has known the individual since he started working at the site in October 2004. Tr. at 125. For much of that period he has been the individual's supervisor. He testified that prior to the May 2006 PIP, the individual often became frustrated with work-related problems. Tr. at 132. Since May 2006 there has been a significant change in the individual's behavior. "In the last year or so, I don't see any of that in [the individual] anymore. [The individual] is fully engaged and works with the [other] employees." Tr. at 129. "I think he now feels like he's part of the group . . . he seems to me to be a happy productive member of our team." Tr. at 130.

F. The Individual's Sister

The individual's sister testified that after a period of limited contact, she reconnected with the individual in 2004. Tr. at 95. Since that time, they have seen each other several times and speak on the telephone twice a week. Tr. at 98. She testified that the individual told her about his 2004 hospitalization and the May PIP. Tr. at 100 and 103. They have discussed the individual's depression medication and his counseling sessions. Tr. at 103. He has also told her about his friends in his motorcycling group. Tr. at 106.

She testified that since the individual has been seeing his counselor he is "happier, he's more well adjusted, he's able to handle stressors better." Tr. at 107. She believes that the individual wants to maintain those improvements in his life and therefore he will continue to see his counselor. Tr. at 107

G. The Individual

1. Criterion H Security Concern

The individual testified that in March 2004 he felt hopeless after a disagreement with his supervisor. He went to a local hospital where he was diagnosed with depression. Tr. at 167. He was hospitalized for

seven days. Tr. at 168. Following that hospitalization, he received medication for his depression. However, he soon stopped taking that medication because he could not afford the medication after his medical coverage ended when he lost his job. Tr. at 185.

After he started working at the DOE site in October 2004, he sought treatment from a new psychiatrist and a new psychologist. However, these professional relationships ended quickly. He believes the psychiatrist did not do an adequate evaluation and therefore he decided to discontinue taking the medication prescribed by that psychiatrist. Tr. at 185. He also stopped seeing the psychologist because he did not have a good relationship with her and the advice that she provided was not productive. Tr. at 183.

After he received the May PIP the individual started seeing a new psychologist and psychiatrist. Those experts testified at the hearing and their testimony is summarized above in the sections entitled in the individual's psychiatrist and the individual's psychologist. Tr. at 179. The individual testified that the psychiatrist prescribed Wellbutrin. Tr. at 193. He believes the Wellbutrin has helped him and he testified that he will follow the psychiatrist's medical directions and continue to take all medication that she prescribes. Tr. at 195.

The individual testified that his psychologist has provided him with excellent tools to manage his relationships with other people. Tr. at 162. He testified that during his counseling sessions he has learned new perspectives on problem solving and techniques for dealing with stress without becoming angry. Tr. at 163. He testified that "I want to continue my therapy so those changes are permanent. Those changes will be part of my lifestyle." Tr. 195. He testified that

I'm going to maintain the current level of my therapy, because I'm seeing, personally, the changes that I'm working through. The issues that I'm working through. I'm seeing those changes. I'm happy with those changes, and I want to continue my therapy so those changes are permanent. Those changes will be part of my lifestyle.

Tr. at 195. He added, "I want to be a healthy individual, not just in society, but for myself. I'm doing this for myself. I'm not doing this for my clearance." Tr. at 196.

2. Criterion L Security Concerns

The individual testified that on March 12, 2004 his employer terminated his employment. Tr. at 162. The individual testified that his employer told him he was being terminated for workplace violence. The individual stated that he told his employer there was no workplace violence but the employer refused to change its determination to terminate him. He retained an attorney who contacted the former employer. At that time, the former employer agreed to change his employment record to indicate that he voluntarily resigned. Tr. at 170.

The individual testified that he reported his March 2004 hospitalization on his QNSP. Tr. at 200. He also testified that he did not report his 2005 psychiatric treatment because a fellow employee told him that reporting that information could affect his employment and therefore he decided to "hide it." Tr. at 184. He testified that "I understand now that [derogatory information] cannot be held back." Tr. 184.

H. The DOE Consulting Psychiatrist

After hearing the testimony, the DOE consulting psychiatrist testified that the individual's psychologist is helping the individual cope with his personality disorder not otherwise specified. "She's working on coping skills and how [the individual] views what others are saying to him and, therefore, how does he take it and react to that. It does not matter what [the diagnosis is] she's addressing exactly the [personality disorder] characteristics that I was concerned with." Tr. at 214.

She indicated that the individual has a good relationship with his psychologist and he "seems to be using the skill that he has been taught by [his psychologist] to pretty good effect, and he's using them at the workplace and he's using them outside the workplace, using them in relationship to his family members, and in dealing with his mother's illness. These are all good, good indicators." Tr. at 217. The DOE consulting psychiatrist stated that the testimony of the co-workers that see him every day have seen a difference in his behavior and they say "he is much more under control, much less easily frustrated, happier, social, more outgoing." Tr. at 217. They value him as an employee and "see him as a pretty steady person and as someone who does his job well and who gets along with others." His friends indicate the same thing." Tr. at 216. The DOE consulting psychiatrist also testified that the medication he is taking for depression seems to be evening out his moods. Tr. at 217.

She testified that the individual likes the way he feels now. She believes that if the individual were to have a recurrence of his depression or difficulty with personal relationships he would seek help from his psychologist and psychiatrist. Tr. at 219. She also testified that, as a result of his better understanding of his problem if the individual had recurrence it would be less likely to affect his judgment and reliability. Tr. at 219. She summarized her testimony by indicating "he has the tools now, and he's using them and has been using them to good effect, so that should something come up in the future, he'll be able to address it in a more appropriate manner." Tr. at 220.

She indicated that if he continues his treatment and learning additional coping skills there is a relatively low probability that he will have problems in the future. Tr. at 224.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R.

§ 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring her access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing* (Case No. VSO-0002), 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

A. Criterion H Security Concern

I believe the individual's treatment has resulted in behavioral changes that have mitigated the security concern related to the DOE consulting psychiatrist's diagnosis of depression and personality disorder. The individual's testimony indicated that prior to May 2006 the individual did not understand the nature of his depression or his problems in dealing with others. However, after receiving the May 2006 PIP he realized that he needed to be fully involved in professional treatment.

The testimony of the three experts indicated that the medication he is taking for depression has reduced his depression symptoms and the coping skills he has learned from his psychologist have improved his relationships with others. The testimony of his co-workers, friends and sister indicate that the individual's behavior in the last year has significantly changed in that he is better able to deal with other people and he now is able to handle stressful situations without becoming angry. These changes have ended the verbal outbursts which have previously caused him significant problems.

The DOE consulting psychiatrist indicates that she believes that the probability that the individual will have serious personality problems in the future is low. The testimony of his sister, friends and professionals indicates that the individual now understands the importance of the treatment he has received and the individual's own testimony indicates that he is fully aware that the treatment has improved his life. I therefore believe that it is unlikely that his depression and personality disorder will cause the serious verbal outbursts that have occurred in the past and that he will better control himself in his dealings with other people. I therefore believe he has sufficiently mitigated the Criterion H security concern.

B. Criterion L Security concern

The Criterion L security concern is based on two factors. The first is the individual's verbal outbursts. The second is the individual's unreliability in providing timely and complete information to the DOE.

I believe he has mitigated the concerns related to his verbal outbursts. The outbursts caused him to be terminated from his employment in March 2004 and to be placed on the May 2006 PIP. The individual has received treatment for his depression and learned skills to deal with stress in the workplace. As indicated above, I believe that the probability that those behaviors will recur is low. Therefore, I believe the Criterion L concern related to those behaviors has been mitigated.

The second basis for the Criterion L concern is the individual's incomplete report of his hospitalization on his 2004 QNSP and his failure to report his 2005 psychiatric treatment. The DOE relies on its clearance-holders to reliably report unfavorable information regardless of whether they are embarrassed by it or unsure of the consequences. When an individual fails to reliably report information, it leads the DOE to question whether that individual can be trusted to be candid with the DOE and report negative information in the future. My review of the record and my perception of the individual's testimony leads me to believe that the individual does not understand the importance of reliably providing complete and accurate information to the DOE.

The notification letter indicates that the individual failed to completely disclose the March 2004 mental hospitalization on question 21 of his December 2004 QNSP. That question asks the filer to disclose the names and dates of consultations with mental health professionals that occurred in the last seven years. The individual answered that question by providing the name of a physician whom he consulted in March 2004. That answer does not provide complete information on the various professionals who treated him during his seven day involuntary hospitalization. The individual may believe that disclosing one physician's name was a satisfactory response to the question. However, a candid answer to that question would have, at a minimum, provided additional detail on the circumstances of the treatment in the "continuation space" provided near the end of the form. An answer to a question on a QNSP that makes it difficult to understand the full circumstances of derogatory information suggests that the individual is not committed to reliably providing complete information. Such unreliability is inappropriate for the holder of an access authorization.

In discussing this matter at the hearing the individual testified that he disclosed the psychiatric treatment on his QNSP. I find this testimony at the hearing contending that his answer on the QNSP was adequate confirms that even now he does not yet understand the obligation of an access authorization holder to provide fully candid detailed information.

A second example of providing incomplete information concerns question 22 on the same QNSP. That question asked for information on leaving a job under unfavorable situations. The individual's response to that question was that he left a job in March 2004 after voluntarily resigning. This may well be an accurate report of the agreement his attorney reached with his former employer. However, it is not a complete description of the actual events. By minimizing derogatory information, the individual does not permit the DOE to understand the full scope of his past. This weakens the DOE's ability to make an informed decision about his suitability for an access authorization. This, after all, is the fundamental purpose of requiring those applying for an access authorization to complete a QNSP.

I also found the individual's testimony at the hearing that dealt with his behavior prior to his March 2004 discharge to be unreliable. He was asked if he had any confrontation with his supervisor. He responded "I can't remember." Tr. at 170. To the question of whether he had ever received any reprimands he responded: "Not that I can remember." Tr. 171. He was asked if he had problems with other employees. Rather than answer the question, he discussed the stress that all the workers were under. Tr. at 171. I believe during the hearing the individual was not willing to disclose complete information about his behavior prior to his discharge.

Finally, the notification letter indicated the individual failed to disclose his 2005 psychiatric treatment. At the hearing, the individual admitted that he failed to provide that information. He testified that he failed to disclose it to the DOE because he was afraid of the consequences.

During the hearing, the individual testified that he now recognizes that he must disclose information to the DOE. That statement, in and of itself, does very little to mitigate the DOE security concern, given the individual's failure to provide complete information at the hearing about his March 2004 discharge and his less than complete statement at the hearing about his disclosure of his March 2004 hospitalization on his QNSP. Therefore, I believe that the individual has failed to mitigate the DOE Criterion L security concern related to providing unreliable information.

V. CONCLUSION

I have concluded that the individual has mitigated the DOE security concern under Criterion H but has not mitigated the DOE security concern under Criteria L of 10 C.F.R. §710.8. In view of the record before me, I am not persuaded that granting the individual access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be granted.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals
Date: July 25, 2007